UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, vs. LINDA HOFFMAN, in her official capacity a Director of the Washington Department of Ecology, et al., Defendants.	No. CV-04-5128-AAM **ORDER GRANTING MOTION TO CERTIFY, *INTER ALIA***

BEFORE THE COURT is the defendants' "Motion To Certify" (Ct. Rec. 63). Telephonic argument was heard on February 3, 2005. Kenneth C. Amaditz, Esq., argued for the United States. James R. Spaanstra, Esq., argued for intervenor-plaintiff Fluor Hanford. Stephen A. Smith, Esq., argued for intervenor-plaintiff Tri-City Industrial Development Council (TRIDEC). Laura J. Watson, Esq., argued for the defendants. Michael Robinson-Dorn, Esq., argued for the intervenor-defendants, Yes on I-297: Protect Washington, et al..

Defendants ask this court to certify questions to the Washington State Supreme Court regarding interpretation and construction of certain terms and provisions of Washington's Cleanup Priority Act (CPA). The CPA is the result of an initiative (I-297) passed by Washington voters this past November.

To warrant district court certification, "[i]t is sufficient that the statute is susceptible of . . . an interpretation [that] would avoid or substantially modify the federal constitutional challenge to the statute." *Bellotti v. Baird*, 428 U.S. 132, 148, 96 S.Ct. 2857 (1976). It is not a condition precedent to certification, however, that a State concede the unconstitutionality of a statute if it is construed a particular way. *Arizonans For Official English v. Arizona*, 520 U.S. 43, 77, 117 S.Ct. 1055 (1997). "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Id.* at 79. *Arizonans* came to the Supreme Court by way of the Ninth Circuit. In a decision rendered after *Arizonans*, the Ninth Circuit acknowledged that "even when we find the plain language of a state law dispositive, we have an obligation to consider whether novel state-law questions should be certified- and we have been admonished in the past for failing to do so." *Parents Involved In Community Schools v. Seattle School Dist, No. 1*, 294 F.3d 1085, 1086 (9th Cir. 2002), citing *Arizonans for Official English*, 520 U.S. at 76-79. Taking advantage of certification may "greatly simplif[y]" an ultimate adjudication in federal court. *Bellotti*, 428 U.S. at 151.

Upon consideration of the parties' briefs and their oral arguments, this court concludes that even if the CPA is not susceptible of an interpretation that would avoid the constitutional challenge to it (and the court is not entirely ruling out the possibility that it may be susceptible to such an interpretation), it is at least susceptible of an interpretation that would substantially modify the constitutional challenge and, in the process, greatly simplify the adjudication of the constitutional issues before this court.

The United States contends interpretation of the CPA is irrelevant because the purpose of the statute is apparent. It is clear, however, that the interpretation sought by the defendants from the state supreme court is intended to reveal the purpose of the CPA, a "novel" State Act which has yet to be reviewed by the state supreme court. Of course, this court will decide if that purpose is unconstitutional (i.e., if it seeks to regulate that which is already preempted by federal law).

This court finds no compelling need to consider merits briefs filed by the State and the intervenor-defendants, and replies thereto by the United States and the intervenor-plaintiffs, before granting certification. In a merits brief on the constitutional issues, the State and the intervenor-defendants would offer an interpretation of the CPA which should instead be offered in the first briefs they file with the state supreme court regarding the certified questions. The United States and the intervenor-defendants will have an opportunity to respond in the briefs they subsequently file with the state supreme court.[1] Were this court to grant certification at the conclusion of the merits briefing in this court, it would only further delay ultimate resolution of the constitutional questions remaining after answers are received from the state supreme court.

While it appears the questions pertaining to the definition of "mixed waste" (Nos. 1(a), 1(b), 1(c) and 1(d)) are the critical questions, certification of the other questions presented by the defendants (Nos. 2-5) is appropriate considering they involve issues explicitly or implicitly raised by the United States in the summary judgment brief which it has already filed. Moreover, efficiency is served by taking the opportunity to have all of these questions answered at once by the state supreme court. *Virginia v. American Booksellers Association*, 484 U.S. 383, 397, 108 S.Ct. 636 (1988).

Defendants' Motion To Certify (Ct. Rec. 63) is **GRANTED**. A separate "certification" of the questions to the state supreme court will be issued along with this order.

The briefing schedule and hearing date on the CPA constitutional issues heretofore agreed to by the parties and/or ordered by this court is **VACATED**, with the caveat that TRIDEC retains the option of serving and filing its brief currently due February 16, which presumably will seek summary judgment on TRIDEC's Contract Clause claim. If TRIDEC opts to file that brief, the

---

[1]The state supreme court is competent to consider any federal precedent cited regarding interpretation of terms found in both federal and state laws. *Berg v. Popham*, 307 F.3d 1028, 1031-32 (9th Cir. 2002) (Alaska Supreme Court had previously looked to federal-court interpretations of CERCLA to resolve issues related to similar Alaska statute and was "the most appropriate body to undertake [the] inquiry" as to the Alaska legislature's intended scope of "arranger liability" under the Alaska statute).

State and the intervenor-defendants will either respond to the merits of the Contract Clause claim no later than **March 9**[2], or serve and file a motion no later than **February 23** seeking to stay summary judgment disposition of that claim due to the questions already certified to the state supreme court, or serve and file a motion no later than **February 23** to certify additional questions to the state supreme court based on the Contract Clause issues presented by TRIDEC in its brief.[3]

Currently, in *State of Washington v. Abraham*, CV-03-5018-AAM, there is a preliminary injunction which enjoins the United States from shipping any off-site TRU (transuranic waste) to the Hanford site. That injunction was issued because of "serious questions" regarding possible violations of NEPA (the National Environmental Policy Act). The United States has moved to dissolve that injunction and hearing is scheduled for April 28.[4] In 03-5018, the State, on the basis of additional alleged violations of NEPA, has moved to expand the preliminary injunction to include off-site LLW (low-level waste) and MLLW (mixed low-level waste) which the United States intends to ship to Hanford. That motion is also scheduled for hearing on April 28. Pending a decision on those motions, or May 13, 2005, whichever is earlier, the United States has voluntarily agreed to suspend shipments of LLW and MLLW to Hanford.

On December 2, 2004, this court entered a temporary restraining order (TRO) in the captioned case which was as follows: "Pending a preliminary injunction hearing, I-297 shall not be applied or enforced with respect to the activities on the Hanford Nuclear Reservation and at the Pacific Northwest National Laboratory, '**except to the extent that it prohibits import of mixed waste to Hanford.**'"(Emphasis added). The exception was in recognition of the existing

---

[2] In that case, the reply brief of TRIDEC will be filed March 23 and hearing will tentatively remain set for April 28.

[3] Of course, if the State chooses either of the latter two options, it should seek expedited hearing.

[4] This court's recent ruling on the scope of the TRUM (transuranic mixed waste) exemption in the WIPP Land Withdrawal Act of 1996 may have some bearing on whether and to what extent that injunction should be dissolved.

preliminary injunction regarding TRU and the previous agreement of the United States to suspend shipments of LLW and MLLW to Hanford pending resolution of the NEPA issues in 03-5018. In their December 10, 2004 "Revised Stipulation And Order As To Scheduling," the State of Washington and the United States agreed to extend the TRO to the earlier of a decision on the summary judgment motions pertaining to the constitutionality of the CPA, or May 13, 2005.

It is highly unlikely that the state supreme court will have the certified questions answered by May 13, 2005 and that this court will have ruled upon the remaining CPA constitutional issues by that date. If this court grants an expanded injunction as to LLW and MLLW and does not dissolve the injunction regarding TRU in 03-5018, it may eliminate or considerably lessen the likelihood of any issue regarding enforcement of the CPA's prohibition on importation of mixed waste to Hanford. There is, however, the possibility the State will not get an expanded injunction as to LLW and MLLW, and also the possibility that the existing preliminary injunction regarding TRU will be dissolved in its entirety or in part. Accordingly, the United States is justifiably concerned about operation of the CPA's prohibition on importation of mixed waste pending the state supreme court providing answers to the certified questions and this court resolving the constitutional issues which remain thereafter. Because certification could considerably delay ultimate resolution of the constitutional issues regarding the CPA, the State and the intervenor-defendants have agreed to suspending enforcement of the CPA in its entirety, including the prohibition on importation of mixed waste, pending the certification process and resolution of the constitutional issues remaining thereafter.[5]

The temporary restraining order entered December 2 is modified such that pending completion of the certification process and resolution of the constitutional issues remaining thereafter, the CPA, in its entirety and without exception, shall not be applied or enforced with respect to the activities on the Hanford Nuclear Reservation and at the Pacific Northwest National Laboratory.

---

[5] The United States expresses concern about "citizen suits" under the CPA. If a "citizen", other than one of the intervenor-defendants, files a suit, it will have to be dealt with when it arises.

IT IS SO ORDERED. The District Court Executive shall enter this order and forward copies to counsel.

DATED this 8th of February, 2005.

s/ Alan A. McDonald
ALAN A. McDONALD
Senior United States District Judge